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Thomas E. Capps

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taxation of the income of a short-term trust have been either solved or simplified by the so-called "Clifford Trust" provisions of the 1954 Code,<sup>37</sup> and if the grantor will carefully comply with their requirements, he will be largely assured that the trust income will not be taxed to him.

Tax consequences of a gift and leaseback are sufficiently predictable to permit use of the device for income-splitting among family members. However, taxpayers should be wary in using the device with a short-term trust so long as the possibility exists that a reversionary interest held by the grantor in the trust corpus will be found to be a prohibited equity under section 162(a)(3).

Until this issue is settled favorably, it would appear wise to make a gift of the entire fee to the trust, to sell the reversionary interest, or to give the remainder interest to another beneficiary who is not so related to the taxpayer as to raise an issue of his possible continued control over the property.

THOMAS J. BOLCH

#### Taxation—Strike Benefits as Income

The Internal Revenue Code excludes from gross income "the value of property acquired by gift."<sup>1</sup> Although similar language was contained in the first income tax statute<sup>2</sup> following enactment of the sixteenth amendment and in all subsequent revenue acts,<sup>3</sup>

<sup>37</sup> INT. REV. CODE OF 1954, §§ 671-78. The name "Clifford" comes from *Helvering v. Clifford*, 309 U.S. 331 (1940), the landmark case requiring the settlor to pay tax on the income of a short-term trust where he retained substantial elements of control over the trust corpus and income. This case caused a great amount of uncertainty and resulted in the promulgation by the Treasury of the Clifford Regulations, which set up a series of clear tests defining the situations in which the income of a trust would be taxable to the grantor. These regulations were put into the Code itself in 1954.

<sup>1</sup> INT. REV. CODE OF 1954, § 102(a).

<sup>2</sup> Revenue Act of 1913, ch. 16, § II(B), 38 Stat. 167, provided that gross income shall not include "the value of property acquired by gift, bequest, devise, or descent."

<sup>3</sup> Revenue Act of 1916, ch. 463, § 4, 39 Stat. 758; War Revenue Act of 1917, ch. 63, § 1200, 40 Stat. 329; Revenue Act of 1918, ch. 18, § 213(b)(3), 40 Stat. 1065; Revenue Act of 1921, ch. 136, § 213(b)(3), 42 Stat. 238; Revenue Act of 1924, ch. 234, § 213(b)(3), 43 Stat. 268; Revenue Act of 1926, ch. 27, § 213(b)(3), 44 Stat. 24; Revenue Act of 1928, ch. 852, § 22(b)(3), 45 Stat. 798; Revenue Act of 1934, ch. 277, § 22(b)(3), 48 Stat. 687; Revenue Act of 1936, ch. 690, § 22(b)(3), 49 Stat. 1657; Revenue Act of 1938, ch. 289, § 22(b)(3), 52 Stat. 458; INT. REV. CODE OF 1939, § 22(b)(3), as amended, ch. 619, § 111(a)(3), 56 Stat. 809 (1942) (now INT. REV. CODE OF 1954, § 102(a)).

Congress has never defined "gift"<sup>4</sup> for income tax purposes, nor has the Commissioner attempted its definition in his regulations.<sup>5</sup> Because of this the definition of "gift" has necessarily been left to the courts to shape on an *ad hoc* basis.

The intention of the donor<sup>6</sup> is the most critical factor in determining whether a particular transfer is a gift. This intention, however, is to be distinguished from the personal property law concept of "donative intent"<sup>7</sup> because the income tax statute uses the term "gift" in a more colloquial sense<sup>8</sup> than did the common law. A gift in the statutory sense must derive from a "detached and disinterested generosity,"<sup>9</sup> arising "out of affection, respect, admiration, charity or like impulses."<sup>10</sup> However, the donor's characterization of his action is not conclusive because "there must be an objective inquiry as to whether what is called a gift amounts to it in reality."<sup>11</sup> The mere absence of a moral or legal obligation to make the transfer does not necessarily create a gift.<sup>12</sup> But, if the transfer proceeds primarily from "the constraining force of any moral or legal duty,"<sup>13</sup> or from the incentive of anticipated benefits,<sup>14</sup> or where payment is in return for services rendered, even though the donor receives no economic benefit,<sup>15</sup> it is not a gift.

Because the law had become "unclear and uncertain"<sup>16</sup> and because of the Treasury's insistence that it had found a "new" test that would "almost automatically dispose of the great bulk of the 'gift' cases,"<sup>17</sup> the United States Supreme Court in 1959 granted certiorari in two cases that were to become the leading cases in the field: *Commissioner v. Duberstein*<sup>18</sup> and *Stanton v. United*

<sup>4</sup> For a proposed solution to the gift *vs.* income problem, which was not adopted, see 106 CONG. REC. 12449 (1960).

<sup>5</sup> See Treas. Reg. § 1.102-1 (1965).

<sup>6</sup> *Bogardus v. Commissioner*, 302 U.S. 34, 43 (1937).

<sup>7</sup> See *Gray v. Barton*, 55 N.Y. 68 (1873).

<sup>8</sup> *Commissioner v. Duberstein*, 363 U.S. 278, 285 (1960).

<sup>9</sup> *Commissioner v. LoBue*, 351 U.S. 243, 246 (1956).

<sup>10</sup> *Robertson v. United States*, 343 U.S. 711, 714 (1952).

<sup>11</sup> *Bogardus v. Commissioner*, 302 U.S. 34, 40 (1937).

<sup>12</sup> *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 730 (1929).

<sup>13</sup> *Bogardus v. Commissioner*, 302 U.S. 34, 41 (1937).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Robertson v. United States*, 343 U.S. 711, 714 (1952).

<sup>16</sup> Brief for Respondent, p. 5, *Stanton v. United States*, 363 U.S. 278 (1960).

<sup>17</sup> *Id.* at 29.

<sup>18</sup> 363 U.S. 278 (1960). In *Duberstein* the taxpayer had from time to

States.<sup>10</sup> The Treasury's "new" test that "gifts should be defined as transfers of property made for personal as distinguished from business reasons"<sup>20</sup> was rejected by the Court, as was the Treasury's suggestion that "motive" rather than "intention" govern the taxability of a particular transfer.<sup>21</sup> In rejecting the Treasury's invitation to fix a "standard to be applied by the lower courts and the Tax Court,"<sup>22</sup> the Supreme Court stated that "the governing principles are necessarily general . . . [and] the problem is one which, under the present statutory framework, does not lend itself to any more definitive

time furnished the president of Mohawk Metal Corp. with the names of potential customers for Mohawk's products. In appreciation, and over his protest that he was owed nothing, taxpayer received a Cadillac automobile. Taxpayer did not include the value of the automobile in his gross income for 1951, deeming it a gift. The Commissioner asserted a deficiency for the value of the car that was sustained by the Tax Court, which found the automobile was remuneration for services rendered by taxpayer. Mose Duberstein, 1958 P-H TAX CT. MEM. 13 (1958). The Court of Appeals for the Sixth Circuit reversed. *Duberstein v. Commissioner*, 265 F.2d 28 (6th Cir. 1959). The Supreme Court reversed the Court of Appeals. 363 U.S. at 293.

<sup>10</sup> 363 U.S. 278 (1960). *Stanton and Duberstein* were argued together and consolidated into one opinion. In *Stanton* taxpayer had been employed for ten years by Trinity Church as comptroller of the church corporation and as president of a "holy" owned subsidiary that the church had established to manage its real estate holdings. In 1942 taxpayer resigned both positions to go into business for himself. In appreciation for his services, the board of directors of the subsidiary, which included the vicar and vestry of the church, voted taxpayer a \$20,000 "gratuity." Taxpayer failed to include the "gratuity" in his gross income, and the Commissioner asserted a deficiency. In taxpayer's suit for recovery, the district court found that the payment was a "gift." *Stanton v. United States*, 137 F. Supp. 803 (E.D.N.Y. 1955), *rev'd*, 286 F.2d 727 (2d Cir. 1959), *remanding for additional finding of fact*, 363 U.S. 278 (1960).

<sup>20</sup> *Id.* at 284 n.6.

<sup>21</sup> The Treasury reasoned that the only factual distinction that could be made among the various kinds of voluntary payments was the difference in "motive," or reasons why they were made. Brief for Respondent, p. 23, *Stanton v. United States*, 363 U.S. 278 (1960). Motive was defined as the inducing cause of the payments or transfer. The Treasury argued that for tax purposes the distinction should be made between those transactions motivated by personal and those motivated by business reasons. Brief for Petitioner, pp. 13-15, *Commissioner v. Duberstein*, 363 U.S. 278 (1960); Brief for Respondent, pp. 29-33, *Stanton v. United States*, 363 U.S. 278 (1960). A business reason was to be any reason that established a "proximate . . . causal relationship between the payment and the conduct of the business, the production of income, or the performances of services." Brief for Respondent, p. 29, *Stanton v. United States*, 363 U.S. 278 (1960). Any reason that was not a business reason would be a personal one. If such a transfer was sufficiently related to the business in such a way as to be an allowable deduction for tax purposes, then it could not qualify as a gift. *Id.* at 30.

<sup>22</sup> *Commissioner v. Duberstein*, 363 U.S. 278, 284 (1960).

statement . . . .”<sup>23</sup> The Court reasoned that the problem “remains basically one of fact, for determination on a case-by-case basis.”<sup>24</sup> It concluded that the decision in each case must be determined by

the application of the fact-finding tribunal’s experience with the mainsprings of human conduct to the totality of the facts of each case . . . . [P]rimary weight in this area must be given to the conclusions of the trier of fact.<sup>25</sup>

In a concurring opinion, Mr. Justice Frankfurter reproached the Court for setting “fact-finding bodies to sail on an illimitable ocean of individual beliefs and experiences.”<sup>26</sup>

It was upon this background of uncertainty that the Supreme Court for the first time considered in *United States v. Kaiser*<sup>27</sup> the income tax consequences of union strike benefits. The taxpayer in *Kaiser* was an employee of the Kohler Company of Wisconsin. The bargaining representative at Kohler, a local of the United Automobile Workers, called a strike, and taxpayer went out on strike although he was not a member of the union. His job was his sole source of income, and when he found himself in need of financial assistance, he applied to the union for help. After he had been questioned about his financial resources and dependents, the union agreed to pay his rent and give him a food voucher redeemable in kind at the local grocery store. To receive these strike benefits taxpayer did not have to join the union, nor did he have to perform any picketing duties. Taxpayer failed to include the amount of the strike benefits in his gross income. In the district court<sup>28</sup> the trial judge submitted to the jury the simple interrogatory of whether the strike assistance was a gift. The jury answered that it was, but the court held as a matter of law that the benefit payments were income. The Court of Appeals for the Seventh Circuit reversed.<sup>29</sup> The Supreme Court agreed with the Court of Appeals, stating that “on the basis of our opinion in the *Duberstein* Case . . . the jury in this case, as finder of the facts, acted within its competence in concluding that the assistance rendered here was a gift.”<sup>30</sup> The

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Id.* at 290.

<sup>25</sup> *Id.* at 289.

<sup>26</sup> *Id.* at 297 (concurring opinion).

<sup>27</sup> 363 U.S. 299 (1960).

<sup>28</sup> *Kaiser v. United States*, 158 F. Supp. 865 (E.D. Wis. 1958).

<sup>29</sup> *Kaiser v. United States*, 262 F.2d 367 (7th Cir. 1958).

<sup>30</sup> 363 U.S. at 303.

court listed several factors from which the jury could have inferred that the assistance did not proceed from a "constraint of moral or legal obligation, of a nature that would preclude it from being a gift."<sup>31</sup> These factors are (1) the form and amount of the assistance and the conditions of personal need, (2) the lack of other sources of income, compensation, or public assistance, (3) the dependency status, and (4) that, while the assistance was furnished only to strikers, it was not conditioned upon performing any strike duties.<sup>32</sup>

Since *Kaiser*, four lower-court cases, two in the federal district court and two in the tax court, have held that union strike benefits were not gifts but were taxable income to the taxpayers. The first of these decisions was *Godwin v. United States*.<sup>33</sup> *Godwin* dealt with payments made by the Air Line Pilots' Association to a striking pilot. In *Godwin* the judge did not let the case go to the jury but held as a matter of law that the strike benefit payments were not gifts. The court listed several factors which it thought distinguished the case from *Kaiser*. First, the union did not consider the personal financial situation of the individual pilots or the availability of help from outside sources, such as unemployment insurance, in determining how much each pilot would be paid, but paid each pilot sixty per cent of his salary. Second, while the amount of the payments in *Kaiser* were very small, were not paid in cash and were not paid directly to the taxpayer, here the payments to the taxpayer amounted to approximately 700 dollars a month and were paid in cash directly to the striking taxpayer. Third, the taxpayer in *Godwin* was a member of the union and participated directly in the strike. Last, the union voted to pay the pilots strike benefits before they actually went out on strike. The court thought that this would give the pilots a "legally enforceable right to receive [the] benefits."<sup>34</sup> In keeping the case from the jury, the court relied on the "motive" of the union in making the payments, reasoning that whether a benefit payment was a gift or income depended

upon whether it flowed from charitable motives exclusively. In other words, in order to get this case to the jury, the Court would have to determine that there is some evidence from which

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<sup>31</sup> *Id.* at 304.

<sup>32</sup> *Ibid.*

<sup>33</sup> 65-1 U.S. TAX. CAS. ¶ 9121 (W.D. Tenn. 1964).

<sup>34</sup> *Id.* at 94, 576.

a jury could find that the only motive for these payments was charitable . . . .<sup>35</sup>

The second case after *Kaiser* was that of *John N. Hagar*,<sup>36</sup> where the taxpayer was employed as a copy editor for a St. Louis newspaper. When the union of which taxpayer was a member, a local of the American Newspaper Guild, called a strike against the newspaper, taxpayer actively participated in the strike and received strike benefit payments. In reaching its decision the Tax Court was careful to state that it found "as a matter of fact"<sup>37</sup> that the payments were income and not gifts. The court thought that the facts that distinguished it from *Kaiser* were (1) the taxpayer was at all times a union member, (2) the benefit payments were not paid to or available for nonunion members, (3) the taxpayer was required to perform strike duties before he was eligible for the benefit payments, and (4) the union's failure to inquire into the financial resources of the taxpayer. The taxpayer's need for the payments was also doubtful.<sup>38</sup>

After *Hagar* came the case of *Halsor v. Lethert*.<sup>39</sup> In *Halsor* the taxpayer, a pilot, was not on strike but was laid off by North-western Airlines as a result of a dispute between the International Association of Machinists and the Air Line Pilots Association. While he was locked out, the local of the ALPA passed a resolution whereby "the pilots furloughed due to the dispute arising from implementation of ALPA Policy"<sup>40</sup> would receive benefit payments from the ALPA. The payments were based on a certain percentage of the pilot's salary and were not subject to setoff against other income received by the pilots during the lockout. The court, in finding as a fact that the payments were not gifts, stressed the "intention"<sup>41</sup> of the union, which it found to be the furtherance of

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<sup>35</sup> *Ibid.* The use of the donor's motive to determine whether a given transfer is to be treated by the recipient as a gift or income was expressly rejected in the *Duberstein* case. See note 21 *supra* and accompanying text.

<sup>36</sup> 43 T.C. 468 (1965).

<sup>37</sup> *Id.* at 486.

<sup>38</sup> *Ibid.* The taxpayer's wife while he was on strike received a bi-weekly take-home pay of \$152.93. Taxpayer had a joint tenancy with his wife and mother in several saving accounts with substantial balances. In addition, taxpayer had some dividend income during the time of the strike. His wife was his only dependent.

<sup>39</sup> 240 F. Supp. 738 (D. Minn. 1965).

<sup>40</sup> *Id.* at 739.

<sup>41</sup> *Id.* at 738.

the objectives of the association and not a " 'detached and disinterested generosity' which is the requisite of a gift under § 102."<sup>42</sup>

The last case dealing with strike benefit payments is that of *Mabel Phillips*.<sup>43</sup> The facts in *Phillips* are almost identical to those in *Hagar*, and the tax court relied heavily on *Hagar* in holding the benefits taxable. In *Phillips*, the taxpayer was a journeyman stereotyper and a member of a local of the Stereotypers' and Electrotypers' International Union that struck the newspaper where he was employed. To receive his benefit payments, taxpayer had to be a member of the union in good standing and had to "sign-in" daily at the strike headquarters. The amount of his payments, which were substantial in comparison with his salary, was not dependent upon his marital status, number of dependents or financial need, but was dependent solely upon his classification as a journeyman. The court concluded that these factors, plus a finding that the union was morally obligated under its constitution to make the payments once the taxpayer went on strike, prevented them from being considered as a gift.

While other areas of the gift *vs.* income dispute may remain "unclear and uncertain," it would seem that the decisions in *Godwin*, *Hagar*, *Halsor*, and *Phillips* have removed some of the confusion as to the income tax consequences of union strike benefit payments. Although the question whether a strike benefit payment in a given case is a gift or taxable income still remains a factual one, it seems certain that the benefits received in any case in which the facts are not very nearly on all fours with *Kaiser* cannot be classified as a gift.

THOMAS E. CAPPS

### Torts—North Carolina's "Good Samaritan" Statute

The 1965 North Carolina General Assembly passed a "Good Samaritan" statute which provides that:

Any person who renders first aid or emergency assistance at the scene of a motor vehicle accident on any street or highway to any person injured as a result of such accident, shall not be

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<sup>42</sup> *Id.* at 740.

<sup>43</sup> P-H TAX CT. REP. & MEM. DEC. ¶ 65, 268 (1965).